

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

February 9, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: October 13, 2004

Case No.: TIA-0251

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for assistance in filing for state workers' compensation benefits. The Applicant was a DOE contractor employee at a DOE facility. An independent physician panel (the Physician Panel or the Panel) found that the Applicant did not have an illness related to a toxic exposure at DOE. The OWA accepted the Panel's determination, and the Applicant filed an appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the appeal should be denied.

I. Background

A. The Energy Employees Occupational Illness Compensation Program Act

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B provided for a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D provided for a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program, and its web site provides extensive information concerning the program.¹

¹ www.eh.doe.gov/advocacy

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004). Congress added a new subpart to the Act - Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B.

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant was employed as a mailroom clerk, janitor, and chemical operator at DOE's Oak Ridge site. The Applicant worked at the site for nearly 13 years, from 1987 to 2000.

The Applicant filed an application with OWA, requesting physician panel review of several illnesses.

The Panel rendered a positive determination on two of the illnesses, and a negative determination on each of the remaining illnesses. The OWA accepted the Physician Panel's determinations. The Applicant filed the instant appeal, requesting review of three illnesses - lung nodule, heavy metal poisoning, and chronic fatigue.

For the claimed lung nodule, the Panel determined that although the Applicant's records show a "small area of ground glass changes," there was no evidence of the presence of a lung nodule. For the claimed heavy metal poisoning, the Panel determined that the Applicant's heavy metal exposure records were within acceptable limits and, therefore, there was insufficient evidence to establish the presence of the illness. For the claimed chronic fatigue, the Panel determined that there is no evidence to establish occupational exposures as possible causes of the illness. The Panel noted the difficulties in diagnosing chronic fatigue. The Panel also stated that there is often significant overlap between chronic fatigue and other illnesses.

II. Analysis

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to a toxic exposure during employment at DOE. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at DOE, and state the basis for that finding. 10 C.F.R. § 852.12.

In her appeal, the Applicant maintains that the negative determinations are incorrect. The Applicant argues that she was subject to various chemical and radiation exposures during the course of her employment at DOE and became seriously ill as a result of those exposures.

The Applicant's arguments do not provide a basis for finding panel error. As mentioned above, the Panel addressed the claimed illnesses, made a determination on each illness, and explained the basis of that determination. For the lung nodule, the Panel determined that the Applicant did not have the illness. For the heavy metal poisoning, the Panel determined that the Applicant's exposure records did not indicate abnormally high level of exposures and, therefore, the illness could not be substantiated. For the chronic fatigue, the Panel determined that there was insufficient evidence establishing a relationship between the illness and occupational exposures. The Applicant's arguments are mere disagreements with the Panel's medical judgment rather than indications of panel error.

As the foregoing indicates, the appeal does not present a basis for finding panel error and, therefore, should be denied. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0251 be, and hereby is, denied.
- (2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: February 9, 2005

